WestVirginiaUniversity
THE RESEARCH REPOSITORY @ WVU

Volume 86 | Issue 2 Article 10

January 1984

Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris: Mandate of Manhart

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STUDENT MATERIAL

Case Comments

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS V. NORRIS: MANDATE OF MANHART

I. INTRODUCTION

In 1964 Congress passed the most far-reaching civil rights legislation since the reconstruction era.[1] Included in the Civil Rights Act of 1964[2] was the controversial[3] Title VII, Equal Employment Opportunities Act.[4] As originally conceived, Title VII was designed to eliminate discrimination in employment based on race, color, religion, or national origin.[5] Before passage, Title VII was amended on the floor of the House to include a prohibition on sex discrimination. The amendment was offered by Congressman Smith of Virginia who subsequently voted against the Act.[6] His reputed strategy was to so clutter Title VII that it would never pass.[7] While the record does not reveal this, it does reveal a somewhat cynical amusement on the part of the male legislators and little serious discussion before the amendment passed 168-133.[8]

The impact of the inclusion of the word sex was probably not fully appreciated at that time.[9] But as Title VII and equal protection sex discrimination litigation developed, the ramifications of including the word sex in Title

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[1] 1964 CONG. Q. ALMANAC 338. President Kennedy sent the original draft to Congress in 1963.

[2] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-16 (1976 & Supp. V 1981)).

[3] 1964 CONG. Q. ALMANAC 367. There had been speculation that the Equal Employment Opportunities Title might be deleted on the floor. The vote was "unexpectedly one-sided."

[4] 42 U.S.C. § 2000e-2(a)(1) [hereinafter referred to as Title VII].

[5] H. R. REP. No. 914, 88th Cong., 2d Sess. #2 *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2401.

[6] *Developments in the Law - Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1166, 1167 (1970-71) [hereinafter cited as *Developments in the Law*].

[7] *Id.*

[8] *See generally*, 110 CONG. REC. 2577-84 (1964). As amended, Title VII reads:

> (a) It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or discharge *any individual*, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. § 2000e 2(a)(1) (emphasis added).

[9] It should be noted that the Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d) (1976)) was passed by Congress following serious debate on the principle of equal pay for equal work. *See generally*, 109 CONG. REC. 9209 (1963).

VII were revealed. In 1978, the United States Supreme Court in *City of Los Angeles, Dept. of Water & Power v. Manhart*,[10] found Title VII's "focus on the individual [to be] unambiguous."[11] The Court held that an employer could not require a female employee to make larger contributions to an employee-funded, defined-benefit pension plan[12] simply because women as a group live longer than men. Though the holding was written in narrow terms,[13] it has been broadly construed in many jurisdictions.[14]

In 1983, the Court in *Arizona Governing Committee For Tax Deferred Annuity and Deferred Compensation Plans v. Norris*[15] logically expanded the *Manhart* ruling invalidating unequal contributions based on sex. In *Norris*, the Court held than an employer could not offer a deferred compensation plan to its employees which paid out less per month in retirement benefits to female employees who were otherwise similarly situated[16] to their male counterparts. The Court found that it was not a valid justification that the actual cash value of the entire benefit would be approximately the same for the female group as for the male group. Although this result was based on the insurance industry's gender-based actuarial tables, the Court held that "[e]ven a true generalization about [a] class cannot justify class-based treatment"[17] under Title VII which focuses on the individual. Further, the Court found that Arizona exerted sufficient control over the plan so as to be liable for its discriminatory provisions.[18]

This comment will analyze *Norris* in terms of the evolution of Title VII and equal protection case law. It will also review the social legislation preceding *Norris* and the impact of the decision on the insurance industry.

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[10] 435 U.S. 702 (1978).

[11] *Id.* at 708; *supra* note 8.

[12] A defined benefit pension plan is one in which an employee's monthly retirement benefit is determined at the time an individual's contributions begin. "Contributions are determined actuarially on the basis of the benefits expected to become payable." U.S. DEPT. OF LABOR, WOMEN AND PRIVATE PENSION PLANS 3 (1980).

[13] 435 U.S. at 717.

[14] *See, e.g.*, Spirt v. Teachers Ins. & Annuity Ass'n., 691 F.2d 1054 (2d Cir. 1982), *cert. granted*, 103 S.Ct. 3565 (1983) (vacated and remanded for further consideration in light of *Norris*, 103 S. Ct. 3492); Retired Public Employees' Ass'n. of Cal. v. California, 677 F.2d 733 (9th Cir. 1982), *cert. granted*, 103 S. Ct. 3565 (1983) (vacated and remanded for futher consideration in light of *Norris*, 103 S. Ct. 3492); Women in City Gov't. United v. City of New York, 515 F. Supp. 295 (S.D.N.Y. 1981); Hannah v. New York State Teachers' Retirement Sys., 26 Fair Empl. Prac. Cas. (BNA) 527 (S.D.N.Y. 1981); EEOC v. Colby College, 589 F.2d 1139 (1st Cir. 1978).

[15] 103 S. Ct. 3492 (1983).

[16] *Spirt*, 691 F.2d at 1058 n.3. ("Similarly situated" individuals are those who are the same age, retire on the same date, and have identical amounts of accumulated contributions in their individual retirement accounts on the date of retirement).

[17] *Norris*, 103 S. Ct. at 3498 (quoting *Manhart*, 435 U.S. at 709).

[18] *Norris*, 103 S. Ct. at 3501.

II. STATEMENT OF THE CASE

The day the decision in *Manhart* was announced,[19] Nathalie Norris filed a class action suit[20] in the United States District Court for the District of Arizona[21] against the State,[22] the Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans[23] and individual members of the committee.[24] Norris alleged that the defendants had violated Section 703(a) of Title VII of the Civil Rights Act of 1964, by administering a defined contribution annuity plan that discriminated on the basis of sex.[25] The challenged pension plan was adopted pursuant to Arizona statutes which permitted voluntary participation[26] and required the plan to operate without state funding.[27] The plan is considered by statute[28] to be a benefit which is supplemental to any other state benefit. The Governing Committee selected several independent companies to participate in offering retirement plans[29] with employees being given three options,[30] two of which were not in dispute. If a female employee chose the option of defined monthly benefits for the remainder of her life, her payment was automatically smaller than a similarly situated male because all the selected companies relied on sex-based mortality tables in computing monthly benefits.[31] These tables show that women as a group live longer than men.

The district court granted summary judgment for the plaintiff class,

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[19] Witt, *Supreme Court Arguments Set on Retirement Discrimination*, 1983 Congressional Q. Weekly 571.

[20] *Norris*, 103 S. Ct. at 3497. The class consisted of all female employees of the State of Arizona "who are enrolled or will in the future enroll in the State Deferred Compensation Plan." (quoting the complaint of paragraph V).

[21] Norris v. Ariz. Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans, 486 F. Supp. 645 (D. Ariz. 1980), *aff'd*, 671 F.2d 330 (1982), *aff'd in part rev'd in part*, 103 S. Ct. 3492 (1983).

[22] As of 1972 Title VII applies to employers in the public as well as the private sector. The activities must be a part of, or affect, interstate commerce. Title VII specifies a minimum number of workers necessary to trigger coverage of the employer. A business is covered if it employs at least 15 workers during each working day in each of 20 or more calendar weeks in the current of preceding year. 1 EMPL. PRAC. GUIDE ¶ 207 (CCH 1981).

[23] Hereinafter referred to as the Governing Committee.

[24] *Norris*, 103 S. Ct. at 3495.

[25] *Id.*

[26] ARIZ. REV. STAT. ANN. § 38-872(A) (1974).

[27] *Id.* at § 38-871(c)(1) (Supp. 1975-83).

[28] *Id.* at § 38-874(A) (1974).

[29] *Norris*, 103 S. Ct. at 3494.

[30] *Id.* The options are (1) single lump-sum payment upon retirement; (2) periodic payments of a fixed sum for a fixed period; (3) monthly annuities for life. *See*, *Norris*, 486 F. Supp. at 650. (The fact that employees may select an option other than option 3 has no bearing on the lawfulness of the plan.)

[31] *Norris*, 103 S. Ct. at 3495.

finding a Title VII violation.[32] The court directed Arizona to "cease using sex-based actuarial tables and to pay retired female employees benefits equal to those paid to similarly situated males."[33] The district court subsequently denied Norris' motion to amend the judgment to include an award of retroactive benefits to previously retired female employees.[34] The United States Court of Appeals for the Ninth Circuit affirmed[35] the district court's order that annuity payments to retired females shall be equal to those for similarly situated males.

In a brief per curiam opinion the Supreme Court found a Title VII violation. Arizona's employee option of receiving retirement benefits from one of several companies, all of which pay women who elect the life option lower monthly benefits than men who have contributed equally, was found to constitute discrimination on the basis of sex,[36] thus affirming that part of the lower court's holdings. However, the decision was made nonretroactive. Only benefits derived from contributions after the date of this decision must be calculated without regard to the sex of the employee.[37] This part of the decision reversed the circuit court holding.

A separate opinion by Justice Marshall[38] noted the importance of the resolution of two issues: whether petitioners would have violated Title VII if they had run the plan themselves without the participation of insurance companies,[39] and if so, whether Title VII applied to petitioners' conduct because it was the companies who actually discriminated in calculating and paying benefits.[40]

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[32] *Id.* at 3492-93.

[33] *Id.* at 3495.

[34] *Id.* at 3495 n.5. As Justice Marshall noted, the district court's ordered relief is at least partially retroactive in nature. The equalization of benefits to be paid out to women retiring after the date of the ruling would be funded from contributions which were calculated to support smaller monthly benefits to retired females. The district court refused to make their ruling completely retroactive which would have meant the inclusion of and the equalization of payments to already retired female employees.

[35] *Id.* at 3495. The ruling on the retroactivity motion was not appealed. *Id* at 3495 n.5.

[36] *Id.* at 3493.

[37] *Id.*

[38] *Id.* at 3494-504. Justice Marshall's opinion finding a Title VII violation received a majority of votes. It was joined by Brennan, White, Stevens, and O'Connor, J.J. and is hereinafter referred to as the Marshall majority opinion.

Justice Marshall's opinion making the relief at least partially retroactive did not receive majority support. It was joined by Brennan, White, and Stevens, J.J., and is hereinafter referred to as the Marshall minority opinion.

Justice Powell's dissenting opinion, finding no violation under Title VII, was joined by Burger, C.J., Blackmun and Rehnquist, J.J., and is hereinafter referred to as the Powell dissent. Justice Powell's opinion not awarding any retroactive relief was joined by Burger, Blackmun, Rehnquist, and O'Connor, J.J., thus forming a majority, and is hereinafter referred to as the Powell majority opinion. In addition, O'Connor, J., wrote a separate concurrence.

[39] *Id.* at 3496.

[40] *Id.* at 3499.

Relying on *Manhart*, the five-to-four Marshall majority opinion found Arizona's assertion, that its plan was nondiscriminatory because the annuity policies would have roughly equal present actuarial value, was to misunderstand Title VII as interpreted by *Manhart*.[41] "Title VII requires employers to treat their employees as *individuals* not 'as . . . components of a . . . class.' "[42] Since Arizona incorrectly assumed Title VII permitted an employer to classify employees on the basis of sex to predict longevity, they "plainly would have violated Title VII if they had run the . . . plan themselves."[43] Arizona selected the insurance companies. By law[44] employees could use only the state-selected companies. Therefore, "there can be no serious question that petitioners are legally responsible for the discriminatory terms."[45]

Justice Marshall's opinion favoring at least partial retroactive relief[46] was rejected by Justice O'Connor, who joined Section III of the dissent, thus forming a majority in making the relief prospective in order to reduce the "magnitude of [the] burden."[47] The Powell dissent believed that "Title VII was [not] intended to revolutionize the insurance and pension industries,"[48] and that the Marshall majority had gone too far in extending Title VII coverage in effect to insurance companies, in violation of the McCarran-Ferguson Act.[49]

III. PRIOR LAW

The state of the law before the *Norris* decision is an amalgam of case law and statutory law. The Equal Pay Act of 1963[50] was an outgrowth of the World War II, National War Labor Board's policy of "equal pay for women."[51]

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[41] *Id.* at 3497-98.

[42] *Id.* at 3498. (originial emphasis) (quoting *Manhart*, 435 U.S. at 708).

[43] *Id.* at 3499.

[44] *Id.* at 3501 (citing ARIZ. REGS. 2-9-06.A, 2-9-20.A).

[45] *Id.* at 3501.

[46] *Id.* at 3503.

[47] *Id.* at 3510.

[48] *Id.* at 3506 (quoting *Manhart*, 435 U.S. at 717).

[49] *Id.* The relevant section of the McCarran-Ferguson Act, 59 Stat. 33 (codified as amended at 15 U.S.C. §§ 1011-15 (1976)) reads "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b) (1976).

[50] 29 U.S.C. § 206(d)(1) (1976). The Act states in part:

> No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any factor other than sex: *Provided*, That an employer . . . in order to comply with provisions of this subsection, [shall not] reduce the wage rate of any employee.

[51] H. REP. No. 309, 88 Cong., 1st Sess., *reprinted in* 1963 U.S. CODE CONG. & AD. NEWS 687. *But see*, Shultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3rd Cir.), *cert. denied*, 398 U.S. 905 (1970).

Legislation to end wage discrimination had been recommended by the two preceeding administrations as well as by the Kennedy Administration.[52] The pressure for passage of this act was no doubt in part a result of the enormous number of women who entered the work force for the first time during World War II. In reviewing the congressional hearings and the "Declaration of Purpose" for the Equal Pay Act,[53] the fifth circuit found the congressional purpose of the Act to be "[t]he elimination of those subjective assumptions and traditional stereotyped misconceptions regarding the value of women's work."[54]

An understanding of congressional purpose in passing the Equal Pay Act is relevant in attempting to interpret what must have been the intent of the members of Congress who voted for the Smith Amendment, which added sex as a class to be protected under Title VII, since there is so little in the congressional record.[55] The Bennett Amendment[56] to Title VII harmonized the Equal Pay Act's permissive discriminatory impact provisions[57] with Title VII.

An employer may differentiate among employees in determining pay on the basis of seniority, merit, quantity and quality of production or any other factor other than sex. If as a result of an employer's use of any of these valid differentials, one sex is favored, the Bennett Amendment insures that a Title VII violation will not be found. The Bennett Amendment laid the foundation for a defense which was later used by the defendants in *Manhart*[58] and referred to by the Court in *Norris*,[59] that is sex-differentiated actuarial tables were based on longevity, a "factor other than sex."

An early and important Title VII decision by the United States Supreme Court determined whether facially neutral procedures could constitute

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The national Labor War Board's policy was actually equal pay for "comparable" work. The Board evaluated jobs even between dissimilar occupations. Congress did not adopt a broad comparable standard. Rather, Congress prescribed equal pay for "substantially equal" work.

[52] 1963 U.S. CODE CONG. & AD. NEWS 687.

[53] Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d) (1976)).

[54] Shultz v. First Victoria Nat'l Bank, 420 F.2d 648, 656-58 nn.17-21 (5th Cir. 1969).

[55] *See supra* notes 6-7 and accompanying text.

[56] 42 U.S.C. § 2000e-2(h) which reads in part:

> It shall not be an unlawful employment practice under this subchapter . . . for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid . . . if such differentiation is authorized by the provisions of . . . [the Equal Pay Act]."

[57] Brilmayer, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505, 514-21 (1980). The authors believe the 88th Congress in passing the Equal Pay Act and Title VII as amended by the Bennett Amendment chose between the principle of nodisparate treatment of individuals and the principle of nodisparate impact on groups and decided clearly in favor of the individual.

[58] *Manhart*, 435 U.S. at 712.

[59] *Norris*, 103 S. Ct. at 3498 n.13.

discrimination under Title VII. The Court in *Griggs v. Duke Power*,[60] in a unanimous opinion written by Chief Justice Burger, reversed the lower courts and held under Title VII that "practices, procedures, or tests neutral on their face, and even neutral in terms of *intent*, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[61] *Duke Power* involved a class action suit under Title VII by Black employees against their employer who allegedly used aptitude tests and a high school diploma to discriminate against Blacks.[62] The Court found the employer's tests invalid since they were not job related.[63] *Duke Power* stood for two principles: (1) "consequences," not intent, are controlling;[64] and (2) overt discriminatory acts as well as facially neutral acts with discriminatory impact are proscribed by Title VII.[65] These two principles lead to two different types of cases under Title VII, disparate treatment of individuals and disparate impact on groups. The overlap of these two theories has lead to some confusion in Title VII analysis[66] which, despite resolution in *Manhart*[67] and *Norris*,[68] surfaced again in *Connecticut v. Teal*.[69]

Facially discriminatory regulations based solely on sexual stereotypes

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[60] 401 U.S. 424 (1971).

[61] *Id.* at 430 (emphasis added).

[62] *Id.* at 426-27.

[63] *Id.* at 436. (Congress has commanded that any tests used must measure the person for the job, not the person in the abstract.)

[64] *Id.* at 432.

[65] *Id.* at 431.

[66] *See*, Connecticut v. Teal, 457 U.S. 440 (1982); Brilmayer, *supra* note 57; Comment, *Norris v. Arizona Governing Committee: Title VII's Applicability to Arizona's Deferred Compensation Plan*, 24 ARIZ. L. REV. 1032 (1982).

[67] 435 U.S. 702.

[68] 103 S. Ct. 3492.

[69] 457 U.S. 440 (1982) In *Teal*, the plaintiffs, black employees, argued that a nonjob related test required for promotion had a disparate impact on blacks as a class, since more blacks failed the test than whites. Connecticut defended by pointing to its record of promoting 22.9% of the black candidates and only 13.5% of the white candidates. In other words, the "bottom line result of the promotional process was an appropriate racial balance." 457 U.S. at 442. Focusing on Section 703(a)(2) of Title VII, the Court held, as it had in *Manhart* under section 703(a)(1), that the focus of Title VII is on the individual. When an individual is deprived of an employment opportunity because of failing a nonjob related test, a violation will be found. In the process of achieving a fair result, the Court molded the analysis of a facially neutral procedure which must be shown to have a disparate impact on a group with the focus on the disparate treatment of the individual plaintiffs. Whereas disparate impact cases had previously required plaintiffs to make a showing of group discrimination, the majority in *Teal* did not permit Connecticut to defend by a showing of no discriminatory impact on a group. The plaintiffs' showing of an individual being denied an employment opportunity was sufficient. The dissent noted, "[T]oday's decision takes a long . . . step in the direction of confusion." 457 U.S. at 463. While this may be self-evident in terms of prior Title VII analysis and evidentiary burdens, the Court, as it did in *Manhart* and *Norris*, resolves the issue clearly on the side of protecting the individual from discriminatory effects.

were held to violate Title VII as early as 1971 in *Sprogis v. United Airlines*.[70] Also, in 1971, a law review article[71] caught the Supreme Court's attention and was cited both in *Manhart*[72] and *Norris*.[73] In the article's subsection on sex discrimination, the authors accurately predicted since Title VII's focus is on the individual, "free from any conclusions thay may be drawn from the individual's membership in one sex or the other"[74] it will "mandate . . . equal benefits despite th[e] cost differential"[75] in the insurance industry. The article recognized that this would not be the most economically rational alternative from the employer's perspective, and suggested either a statutory amendment to Title VII permitting employers to pay equal contributions resulting in unequal benefits, or banning sex discrimination in the insurance industry.[76] No such legislation was forthcoming at that time. The issue was still one for the courts.

In 1973, the third circuit, in *Rosen v. Public Service Electric and Gas Co.*,[77] held that retirement plans do fall within the purview of section 703(a)(1) of Title VII with respect to "compensation, terms, conditions, or privileges of employment."[78] The court in *Rosen* read the 1972 Equal Employment Opportunity Commission's regulation[79] with great deference.[80] The court then struck down the Public Service Company's revised pension plan which had discriminated against males hired before the date of the revised plan. The court awarded retroactive relief.[81]

As Title VII case law developed, a separate line of cases under the fourteenth amendment equal protection theory[82] struggled with the issue of gender discrimination. Was sex a suspect class to be treated similarly to the other suspect classes identified in *United States v. Carolene Products*[83] or

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[70] 444 F.2d 1194, 1198 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971). United Airlines regulation that female stewardesses must be single whereas no equivalent regulation existed for male stewards was found by the Court to be discrimination on the basis of female "sex stereotypes."

[71] *Developments in the Law*, *supra* note 6.

[72] 435 U.S. at 707 n.12.

[73] 103 S. Ct. at 3497.

[74] *Developments in the Law*, *supra* note 6, at 1174.

[75] *Id.* at 1173.

[76] *Id.* at 1174-76. The latter seems to be the most prophetic.

[77] 477 F.2d 90 (3d Cir. 1973).

[78] *See supra* note 8.

[79] 37 Fed. Reg. 6837 (1972) (codified at 29 C.F.R. § 1604.9(f) (1982)). "It shall be an unlawful employment practice for an employer to have a pension or retirement-plan which establishes different optional or compulsory retirement ages based on sex, or which differentiates in benefits on the basis of sex." *Id.*

[80] *Rosen*, 477 F.2d at 94 (citing Griggs v. Duke Power, 401 U.S. 424, 433-34 (1971)).

[81] *Id.* at 96. "The relief is intended to restore those wronged to their rightful economic status absent the effects of the unlawful discrimination." *Id.*

[82] U.S. CONST. amend. XIV, § 1 provides, in part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

[83] 304 U.S. 144, 152-53 n.4 (1938).

was some lesser standard of review plausible? Finally, how did equal protection analysis and Title VII interact? In *Reed v. Reed* the Court struck down an Idaho statute which gave preference to men over women when appointing an administrator for a decedent's estate when all other qualifications were the same. The Court reasoned that while the equal protection clause of the fourteenth amendment permits states to legislate classifications, the "classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'"[85] The Idaho Supreme Court concluded that the statute was reasonable because it sought to eliminate probate court hearings on the issue, and thus reduced the court's workload.[86] The United States Supreme Court found this reason "arbitrary"[87] and not within the ambit of the equal protection clause.

Frontiero v. Richardson,[88] going much further than *Reed*, struck down military statutes[89] which made it much harder for the spouse of a female uniformed services officer to get benefits which were automatically given to female spouses of male uniformed officers.[90] The Court held "that classifications based on sex, like classifications based upon race, alienage or national origin are inherently suspect, and must therefore be subjected to strict judicial scrutiny."[91] In dicta, the Court found support for its position in Congress' increasing sensitivity to sex-based classifications.[92] Justice Powell's concurring opinion suggested the reasoning in *Reed* provided sufficient basis for the holding and he would not go so far as to add sex to the inherently suspect classes.[93] More importantly, the concurrence cautioned against the Court's preemption of the legislative process.[94] Noting the Equal Rights Amendment and its submission to the states for ratification, Justice Powell saw the adoption of the amendment as resolving the issue of whether sex is inherently suspect; a decision which the Court need not resolve before the states did. "There are times when this Court under our system, cannot avoid a constitutional decision on issues which normally should be resolved by the elected representatives of the people."[95] Subsequent gender-based classifica-

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[84] 404 U.S. 71 (1971).

[85] *Id.* at 75 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

[86] 404 U.S. at 76.

[87] *Id.*

[88] 411 U.S. 677 (1973) (Brennan, J., plurality opinion joined by Douglas, White, and Marshall J.J.).

[89] 37 U.S.C. §§ 401, 403 (Supp. IV 1980); 10 U.S.C. §§ 1072, 1076 (Supp. V 1981).

[90] *Frontiero*, 411 U.S. at 680.

[91] *Id.* at 688.

[92] *Id.* at 687-88. The Court cited Title VII and the Equal Rights Amendment passed by Congress on March 22, 1972: "Congress itself has concluded that classifications based upon sex are inherently invidious." *Id.* at 687.

[93] 411 U.S. at 677, 692. (Powell, J., concurring).

[94] *Id.*

[95] *Id.*

tion discrimination cases have backed away from *Frontiero's* inherently suspect classification analysis in favor of *Reed's* fair and substantial relation test, a judicial standard of review based on an intermediate level of scrutiny.[96]

In 1974, female plaintiffs in *Geduldig v. Aiello*[97] brought an equal protection gender-discrimination challenge, which according to the Supreme Court did not raise a sufficient showing of discrimination to warrant the intermediate level of scrutiny.[98] The plaintiffs alleged they were discriminated against by the California Unemployment Compensation Disability Fund which covered all risks except dipsomania, drug addiction, sexual psychopathology and disability resulting from normal pregnancies.[99] In a footnote, the Court distinguished this case from *Reed* and *Frontiero*.[100] While *Reed* and *Frontiero* involved discrimination based on gender, this case "merely remove[d] one physical condition—pregnancy—from the list of compensable disabilities."[101] Further, the Court found that "[t]here is no risk from which men [as a group or class] are protected and women are not."[102] Absent a finding of "invidious discrimination,"[103] the Court used a rational basis test and found that California's legitimate concern for keeping the cost of the program low, easily passed the test.[104]

The dissenting judge argued a double-standard had been created; men could receive full compensation for all disabilities, including those which are normally only associated with the male sex, while women's disability coverage was limited.[105] The dissenter believed further that deference should be shown to the EEOC guidelines[106] which had been approved on this matter, and which required pregnancy to be treated as all other temporary disabilities are treated.[107]

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[96] L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1063-66 (1978). *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199 (1977); Kahn v. Shevin, 416 U.S. 351, 355 (1974).

[97] 417 U.S. 484 (1974) (Stewart, J.) (Brennan, J., dissenting, joined by Douglas and Marshall, J.J.)

[98] 417 U.S. at 494-97.

[99] *Id.* at 488-89.

[100] *Id.* at 496-97 n.20.

[101] *Id.* at 496 n.20.

[102] *Id.* at 496-97.

[103] *Id.* at 496-97 n.20.

[104] *Id.* at 497 n.20. The Court did not know how much the costs would rise if pregnancy were included nor did it extend its logic to realize that low income families, whom it was seeking to protect, would most need pregnancy-inclusive disability coverage.

[105] 417 U.S. at 501 (Brennan, J., dissenting).

[106] 29 C.F.R. § 1604.10(b) (1972). In part: "Disabilities caused or contributed to by pregnancy . . . are . . . temporary disabilities and should be treated as such. . . ." 29 C.F.R. § 1604.10(b) (1982) clarifies the regulation: "Disabilities caused or contributed to by pregnancy . . . shall be treated the same as [other] disabilities."

[107] 29 C.F.R. § 1604.10(b) (1972).

A. *Prior Law: Equal Protection and Title VII—Round 1*

The Court's decision in *General Electric v. Gilbert*[108] which brought the fact pattern and equal protection reasoning of *Geduldig* together with a suit brought under the Title VII statute, was so unsatisfactory to the public that Congress "overruled" it, as the Court later acknowledged in *Norris*[109] and in *Newport News Shipbuilding and Dry Dock Co. v. EEOC.*[110] The Supreme Court in *Gilbert* reversed the district court's finding that pregnancy which affects only women, and which was the only disability not included in General Electric's disability program constituted discrimination under Title VII.[111] The district court had shown deference to the EEOC guideline on pregnancy[112] and the EEOC ruling that General Electric's benefits plan was "violative of Title VII."[113] The district court held "disparate treatment of persons, otherwise similarly situated, on the basis of a particular condition, the peculiarity of which is both irrelevant to the purpose of the company program and ineluctably sex linked"[114] constituted discrimination under Title VII. In other words, whether the pregnancy exclusion was facially neutral, or could not meet the fourteenth amendment equal protection disparate impact standard devised by the Court, is irrelevant under Title VII.

The Supreme Court found the reasoning of *Geduldig* controlling and rejected a finding of discrimination.[115] Since Congress did not define discrimination in the Civil Rights Act, the Court found their own definition under equal protection to be a reasonable starting point.[116] General Electric's plan was facially gender-free, and plaintiffs did not meet their burden of showing "that the *effect* . . . is to discriminate against members of one class or another."[117]

A dissent written by Justice Brennan found the Court's characterization of General Electric's plan as a gender-free assignment of risks to be "fanciful."[118] He found by way of analogy to the majority's reasoning that

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[108] 429 U.S. 125 (1976).

[109] "[T]he tension in our cases . . . has since been eliminated by the enactment of the Pregnancy Discrimination Act of 1978 . . . in which Congress overruled *Gilbert* by amending Title VII." *Norris*, 103 S. Ct. at 3498 n.14.

[110] The *Newport News* decision found an employee benefit package which offered spouses of male employees less pregnancy coverage than coverage for pregnant female employees to be discrimination against male employees in their total benefits package and thus a violation of Title VII. "The 1978 Act makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions." *Newport News*, 103 S. Ct. at 2631.

[111] 375 F. Supp. 367 (E.D. Va. 1974), *aff'd*, 519 F.2d 661 (1975), *rev'd*, 429 U.S. 125 (1976).

[112] *See* 29 C.F.R. § 1604.10(b) (1972).

[113] Gilbert, 375 F. Supp. at 381.

[114] *Id.* at 385.

[115] *Gilbert*, 429 U.S. at 136.

[116] *Id.* at 133.

[117] *Id.* at 137.

[118] *Id.* at 148 (Brennan, J., dissenting, joined by Marshall, J.).

"any disability that occurs disproportionately in a particular group-sickle cell anemia, for example—could be freely excluded from the plan without troubling the Court's analytical approach."[119] Further, Justice Brennan cited several congressional actions which comported with the EEOC pregnancy-inclusive rule.[120] He found these actions more persuasive of congressional intent than the majority's reliance on a letter written by the General Counsel of the EEOC in 1966 which said pregnancy could safely be excluded from disability.[121]

Justice Stevens, in a separate dissenting opinion,[122] relied on *Washington v. Davis*[123] and noted that a plaintiff's burden of proving a prima facie violation of a constitutional provision (fourteenth amendment equal protection clause) is "significantly heavier" than a plaintiff's burden in proving a prima facie violation of statutory prohibition against discrimination (Title VII).[124] Under Title VII, "discriminatory purpose need not be proved."[125] He noted further that insurance including disability involves future risks. The classification should be between persons who face a risk of pregnancy and those who do not.[126] Using this analysis, it becomes clear that men are insured by General Electric against all risks while women are not. This denial of an equal benefit of employment should constitute discrimination under Title VII.

B. *Prior Law: Title VII and Equal Protection—Round 2*

The dissent's analysis in *Gilbert* was much more palatable to Congress as demonstrated by their passage of the Pregnancy Discrimination Act of 1978 which rebuked the Court by requiring pregnant women to be treated exactly the same as other employees for all employment-related purposes under Title VII.[127]

It was also a more palatable approach for a majority of the Court who

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[119] *Id.* at 152 n.5.

[120] *Id.* at 158 (referring to 42 U.S.C. § 1604.10). Congress enacted a pregnancy-inclusive rule to govern Railroad Unemployment Insurance Act, 45 U.S.C. § 351(k)(2) (1976); Congress approved and the President signed an identical regulation made by the Department of Health, Education and Welfare under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (1978) 45 C.F.R. § 86.57(c) (1982); Federal workers under the Civil Service Commission are now eligible for maternity and pregnancy coverage under their sick leave program, FEDERAL PERSONNEL MANUAL, ch. 630, sub ch. 13, S13-12 (FPM Supp. 990-2, May 6, 1975) (cited in *Gilbert*, 429 U.S. at 158).

[121] *Gilbert*, 429 U.S. at 142-43.

[122] *Id.* (Stevens, J., dissenting).

[123] 426 U.S. 229 (1976).

[124] *Gilbert*, 429 U.S. at 160.

[125] *Washington*, 426 U.S. at 247.

[126] *Gilbert*, 429 U.S. at 161 n.5.

[127] Pregnancy Discrimination Act of 1978, Pub. L. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (Supp. IV 1978)). For the Court's acknowledgment that both the House of Representatives and the Senate found the dissent to be the correct opinion, see *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 103 S. Ct. 2622, 2628 (1983).

concurred with Justice Stevens in *Manhart*.[128] The Court distinguished its reasoning in *Gilbert* and turned instead to the statutory language of Title VII. The Court held an employer-operated pension plan, supported by employee contributions, which made equal monthly retirement payments to similarly situated adults, violated Title VII by requiring females to make contributions 14.84% higher than males.[129] This requirement was a result of the Department's study of actuarial tables and its own experience which showed that on the average its female employees would live a few years longer than its male employees.[130] The Court held Title VII "precludes treatment of individuals as simply components of a racial, religious, sexual, or national class."[131] Every female employee, therefore, cannot be penalized, in effect, by receiving a smaller paycheck, simply because some females in the group may live longer than some males.[132] "Even a true generalization about the class"[133] cannot justify disparate treatment of individuals.

In balancing the competing social interests of fairness to classes—the equal protection concern, with fairness to individuals—the statutory concern, the Court construed the statute as clearly focusing on fairness to individuals.[134] Therefore, an employment practice which required the 2,000 females to contribute more than the 10,000 male employees did not pass the simple test of whether the evidence showed "treatment of a person in a manner which but for that person's sex would be different."[135] This test has become the controlling test in finding gender-based discrimination under Title VII, a standard which is much easier to meet than the burden of proof necessary to find an alleged constitutional violation.[136]

In addition to the actuarial averages argument, the Department also argued their contribution differential was based on longevity, a "factor other than sex," one of the permissible Equal Pay Act exceptions.[137] The Court rejected the argument as "specious."[138] "[O]ne cannot 'say that an actuarial distinction based entirely on sex is "based on any other factor other than sex." Sex is exactly what it is based on.'"[139]

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[128] 435 U.S. 702 (1978) (Stevens, J., joined by Stewart, White, Powell, and Marshall, J.J., as to Parts I, II, and III; joined by Burger, C.J., and Stewart, White, Powell, Blackmun, and Rehnquist, J.J., as to Part IV).

[129] *Id.* at 705.

[130] *Id.*

[131] *Id.* at 708.

[132] *Id.*

[133] *Id.*

[134] *Id.* at 709.

[135] *Id.* at 711 (quoting *Developments in the Law*, *supra* note 6, at 1170).

[136] *See supra* note 122 and accompanying text.

[137] *Manhart*, 435 U.S. at 711-12. For Equal Pay Act Text, *see supra* note 47.

[138] *Id.* at 713 n.24.

[139] *Id.* at 712-13 (quoting *Manhart*, 553 F.2d 581, 588 (9th Cir. 1976), *vacated and remanded*, 435 U.S. 702 (1978)).

The Department also argued a reverse equal protection argument that "the absence of a discriminatory effect on women as a class justifies an employment practice which, on its face, discriminated against individual employees because of their sex."[140] In other words, since it costs more to provide benefits to the class of women, disparate treatment of individuals is permissible as long as the class is fairly treated. Whether by accident or design in choosing the *Manhart* case, the Department's equal protection argument gave the Court the right moment to distinguish its own prior equal protection/Title VII hybrid logic used in *Gilbert*. The Court in the present case reviewed a plan that is discriminatory on its face, while in *Gilbert* the plaintiffs failed to establish a prima facie case that the disability exclusion for pregnancy was either discriminatory on its face or in effect.[141] The reasoning is vague at best and Justice Blackmun in his concurring opinion in *Manhart* stated the distinction was not drawn on any "principled basis."[142] He believed *Manhart* seriously cut back the effect of *Gilbert* and *Geduldig* and the Court should not hesitate to say so.[143]

The Court rejected the argument that disparate treatment might be acceptable because of costs. Neither Title VII, the courts, nor the Equal Employment Opportunities Commission recognizes cost-justification as a defense.[144]

Though the Court rejected the cost arguments in theory, it was nevertheless concerned with costs as evidenced by its holding in *Manhart* which vacated the district court and circuit court's ruling on retroactive relief. While *Manhart* was pending, the California Legislature enacted a law which made the Department's unequal contribution plan illegal.[145] Plaintiffs then sought a refund of their excess contributions. It is this refund that the Supreme Court refused. *Albemarle Paper Co. v. Moody*[146] had established that under Title VII litigation, backpay should generally be awarded, but could be denied if it "would not frustrate the central statutory purposes of eradicating discrimination . . . and making persons whole for injuries suffered through past discrimination."[147] The Court opined that the decision in *Albemarle Paper* was not controlling in this case because (1) a reasonably prudent administrator may well have assumed the program was lawful prior to *Manhart*.[148] "[T]his is apparently the first litigation challenging contribution

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[140] *Id.* at 716.
[141] *Id.* at 715-16.
[142] *Id.* at 725 (Blackmun, J., concurring in part IV and concurring in the judgment).
[143] *Id.*
[144] *Id.* at 717 n.32. *See* 29 C.F.R. § 1604.9(e) (1982).
[145] *Id.* at 706.
[146] 422 U.S. 405 (1975).
[147] *Id.* at 421.
[148] *Manhart*, 435 U.S. at 720.

differences based on valid actuarial tables . . .";[149] (2) retroactive liability could be "devastating" to the fund;[150] and (3) the harm would fall in large part on "innocent third parties."[151] Justice Marshall in his separate opinion in support of retroactive relief noted that no defense had been raised by the city of Los Angeles which claimed financial insolvency would result if the Court ruled in favor of the plaintiffs.[152] Further, the plaintiffs could not be "made whole" without a refund.[153]

Nevertheless, the majority of the Court in *Manhart* would not award relief unless the legislature plainly commanded the result.[154] The Court foresaw the impact of its holding on the insurance and pension plans and the "[f]ifty million Americans [who] participate" in them.[155] The Court did not want to risk being responsible for jeopardizing the solvency of these companies. Further, the Court created the "open market" exception[156] to its holding, which put the insurance companies on notice that nothing other than responding to the market was required of them at this time. Since Title VII's focus is on the relationship between employees and their employers,[157] the Court in anticipation of the cases involving insurance-contracted pension plans noted that "an employer can[not] avoid his responsibilities by delegating discriminatory programs to corporate shells."[158]

By making its holding prospective,[159] despite the *Albemarle* presumption in favor of retroactivity, the Court in *Manhart* left itself open to charges of judicial legislation, a charge that had concerned members of the Court in *Frontiero*.[160] For this reason and because the ruling in *Manhart* used a new approach to Title VII analysis, the Court attempted to narrow its holding: "[w]e do not suggest that Title VII was intended to revolutionize the insurance and pension industries. All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund."[161]

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[149] *Id.* at 722.

[150] *Id.*

[151] *Id.* at 723.

[152] *Id.* at 731 (Marshall, J., concurring in part and dissenting in part).

[153] *Id.* at 733.

[154] *Id.* at 721.

[155] *Id.*

[156] *Id.* at 717-18.

[157] *Id.* at 718 n.33.

[158] *Id.*

[159] Pure prospectivity limits a ruling to future cases. It does not apply to the parties before the court nor any previous or pending cases. Non-retroactivity limits a ruling to the parties before the court and to future parties, but does not apply to previous or pending cases. Retroactivity does not limit a ruling. Any case that is still reviewable, plus the parties before the court, plus all future litigants receive the benefit of a new principle which is made retroactive. Beytagh, *Ten Years of Non-Retroactivity: a Critique and a Proposal*, 61 VA. L. REV. 1557 (1975).

[160] 411 U.S. 692 (Powell, J., concurring).

[161] 435 U.S. at 717.

Nevertheless, subsequent decisions and the plethora of law review articles which followed *Manhart*, with very few exceptions, construed the decision as covering all employee pension plans which used sex-based actuarial tables to compute contributions and benefits.[162]

C. *Prior Law: Manhart to Norris*

While *Manhart* was extremely significant in the development of a workable Court approach to Title VII litigation, it was also significant for what it did not do.

1. *Manhart* recognized that insurance is based on risk distribution among groups and statistically created group generalizations; nevertheless, "the Court refused to retreat *from* the individual standard."[163]
2. The Court recognized that unisex coverage may have some disparate impact on males, but rejected any suggestion of a disparate impact argument since each retiree's benefits will depend on the individual's own life span.[164]
3. *Manhart* did not explicitly overrule *Gilbert*.
4. *Manhart* did not reach beyond "men and women making unequal contributions to an employer-operated pension fund."[165]

Following *Manhart*, several circuit courts of appeal reviewed cases similar to *Manhart* with one major factual distinction: the cases involved lower monthly payments to women after retirement as the method of equalizing the actuarial value of the policies.[166] In all the cases but one,[167] the courts ruled in light of *Manhart* that it was a violation of Title VII for the plans to discriminate against individual women. This was so even though the annuity/pension program was administered by a large, nonprofit, national legal reserve life insurance company[168] or was a voluntary program.[169]

Only the Sixth Circuit rejected a broad application of the *Manhart* princi-

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[162] *See, e.g., Spirt*, 691 F.2d 1054; Peters v. Wayne State Univ., 691 F.2d 235 (6th Cir. 1982), *vacated* and *remanded*, 103 S. Ct. 3566 (1983); Retired Pub. Employees Ass'n v. California, 677 F.2d 733 (9th Cir. 1982); EEOC v. Colby College, 589 F.2d 1139 (1st Cir. 1978); Jacobs, *The Manhart Case: Sex-Based Differentials and the Application of Title VII to Pensions*, 31 LAB. L.J. 232, 244 (1980); Brilmayer, *supra* note 57 at 560; Key, *Sex-Based Pension Plans in Perspective: City of Los Angeles, Dept. of Water & Power v. Manhart*, 2 HARV. WOMEN'S L.J. 1, 31 (1979).

[163] Comment, *Norris v. Arizona Governing Committee: Title VII's Applicability to Arizona's Deferred Compensation Plan*, 24 ARIZ. L. REV. 1032, 1036 (1983).

[164] *Manhart*, 435 U.S. at 710 n.20.

[165] *Id.* at 717.

[166] *See Manhart*, 435 U.S. at 717-18.

[167] *Peters*, 691 F.2d at 235.

[168] *See Spirt*, 691 F.2d at 1054 and *Colby*, 589 F.2d at 1141.

[169] Norris v. Arizona Governing Comm. for Deferred Annuity and Deferred Compensation Plans, 671 F.2d 330 (9th Cir. 1982), *aff'd in part, rev'd in part*, 103 S. Ct. 3492 (1983).

ple. In *Peters v. Wayne State University*[170] the court ruled that the University was liable for the actions of the Teachers Insurance and Annuity Association of America (T.I.A.A.), but the use of sex-based mortality tables did not violate Title VII.[171] Relying on disparate treatment/disparate impact analysis, the court found the plaintiff had failed to carry his burden of proving the employer intentionally discriminated.[172] Having reconstituted the *Gilbert* and *Geduldig* analysis, the court found its case to be distinguishable from *Manhart*, because *Peters* did not involve an employee's take home pay check, and the employer, Wayne State, did not operate the pension fund for its employees.[173]

The logic of *Peters* was totally rejected in *Norris*,[174] where the Court held that *Manhart's* mandate of "fairness to individuals rather than fairness to classes"[175] was to be broadly construed. Intent is irrelevant, and even validity of the classification is irrelevant, when the challenged behavior is found to work a discrimination on the individual under Title VII. Eight days after *Norris*, the Supreme Court, which had granted *Peters* certiorari, vacated and remanded the *Peters* case in light of *Norris*.[176] Seemingly, *Peters* has been overruled.

IV. ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION V. NORRIS

The pension plan in *Norris* was a deferred compensation plan.[177] It was completely voluntary,[178] and there was a choice of payment following retirement of which only the monthly annuity for life was challenged.[179] Whereas the plan in *Manhart* required unequal contributions to yield the same retirement benefit, the plan in *Norris* for the same contribution yielded unequal monthly retirement payments.[180] Justice Marshall's bare majority in *Norris* found all of these factors to be distinctions without a difference.[181] The reasoning of the Court in *Manhart* controlled. Differentials in monthly annuity payments based solely on the utilization of gender-based actuarial tables constituted discrimination on the basis of sex in violation of Title VII.[182]

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[170] 691 F.2d 235 (6th Cir. 1982).
[171] *Id.* at 238.
[172] *Id.* at 239.
[173] *Id.* at 240.
[174] 103 S. Ct. at 3492.
[175] *Manhart*, 435 U.S. at 709.
[176] 103 S. Ct. 3492.
[177] *Id.* at 3493.
[178] *Id.*
[179] *Id.*
[180] *Id. Cf.*, Comment, *supra* note 163 (distinguishes *Norris* from *Manhart*).
[181] 103 S. Ct. at 3493.
[182] *Id.* at 3498.

Five years had elapsed since the ruling in *Manhart*. It had been broadly construed by the circuit courts. It had not been rejected by Congressional legislation, whereas two decisions, primarily impacting on women, had been. Both the *Gilbert* decision, regarding pregnancy exclusion from benefits plans, and the *McCarty v. McCarty*[183] decision, regarding the nondivisibility of military pensions in divorce actions, had been rejected. *Manhart*, however, remained viable. In fact, Congress has continued to debate the Economic Equity Act,[184] which would extend the *Manhart* principle beyond Title VII by ending all discrimination in the insurance industry.[185] President Reagan, in his 1983 State of the Union address, had openly supported greater equity for women in the pension field.[186] In fact, the Reagan administration had filed an *amicus* brief in *Spirt*,[187] arguing that the use of gender-based actuarial tables to calculate retirement benefits was unlawful under Title VII.[188] Given this background which showed Congressional and judicial approval of the *Manhart* principle that the keystone of Title VII is fairness to individuals, the Court broadened the *Manhart* ruling in *Norris* to repudiate the use of gender-based (or race- or national origin-based) actuarial tables in all employment settings.[189]

The Court in *Norris* issued its opinion in a brief per curiam order. However, Justice Marshall wrote a concurrence[190] which explained the majority's position on the Title VII issue. The Arizona Governing Board argued the insurance industry's position, which was supported by the dissent. Based on sex alone, the present actuarial value[191] of an annuity policy at retirement is approximately the same for males and females, since the probability is that females as a group will collect more payments before death. Females alone, by receiving smaller monthly payments than similarly situated males, financially support the risk that some females will live longer than some males. As the Court noted, sex is the sole distinguishing element in the actuarial

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[183] 453 U.S. 210 (1981). In *McCarty*, the Court ruled that a military pension was not subject to division in a divorce action in a state which otherwise divided property. Congress rejected this by passing The Uniformed Services Former Spouse's Protection Act as Pub. L. No. 97-252, 96 Stat. 730 (1982) which specifically permitted military pensions to be equitably divided.

[184] H.R. 2090, 98th Cong., 1st Sess., 129 CONG. REC. H1155 (1983).

[185] S. 372, 98th Cong., 1st Sess., 129 CONG. REC. S795 (1983); Senate Committee on Commerce, Science and Transportation; H.R. 100, 98th Cong., 1st Sess., 129 CONG. REC. H42 (1983). House Energy and Commerce Committee. Portions of the Economic Equity Act are being introduced as separate bills. Kassell, *Equity Act Could Solve Insurance Bias*. NEW DIRECTIONS FOR WOMEN, May/June 1983 at 4.

[186] Reagan, *Employer Retirement and Pension Plans for Women*, 19 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 980 (1983).

[187] *Spirt*, 691 F.2d 1054.

[188] Witt, *supra* note 19 at 572.

[189] *Norris*, 103 S. Ct. at 3498-99.

[190] *Id.* at 3494-3502.

[191] *Id.* at 3497 n.11.

tables. No social or health factors such as drinking, smoking or medical history are included in determining the risk distribution.[192] The flaw in Arizona's argument is that the Court in *Manhart* determined Title VII prohibits employers from treating their employees as class members if the class is sexually based; therefore "an employer may [not] adopt a retirement plan that treats every individual woman less favorably than every individual man."[193]

Gender-based actuarial tables were the root of the discrimination in *Manhart*. The tables worked the same discrimination in *Norris*. The validity of the gender-based tables, as accurate indicators of longevity, was irrelevant to the Court's decision.[194] However, the Court noted social and health factors which would be equally if not more valid indicators of longevity.[195] Whether or not the insurance industry possessed a discriminatory intent in using sex-based actuarial tables was not even mentioned by the Court. Equal protection arguments were not raised. The district court had rejected the equal protection argument, holding that no clear "purposeful invidious gender-based discrimination"[196] had been shown to support a finding of an equal protection violation. Norris had not appealed the ruling. What strictly controlled the Court's decision was its interpretation in *Manhart* of congressional intent. "Congress has decided that classifications based on sex . . . are unlawful."[197] This intent was measured in *Manhart* and again in *Norris* by congressional and court action since 1964. In other words, the Court looked beyond the limited discussion surrounding the Smith amendment, which added sex to Title VII, to the evolving legislative consensus as to what constitutes Title VII discrimination as it impacts on individuals in any of the five identified groups (sex, race, color, religion or national origin).

Since Arizona incorrectly assumed that Title VII permitted the use of sex to predict longevity and since this was "flatly inconsistent with the basic teaching of *Manhart*,"[198] the Court found Arizona would have violated Title VII if they had run the program themselves.[199] The Court then easily found Arizona liable for the actions of the insurance companies with which it had contracted. Since Arizona invited the companies to make bids, asked the bidders to quote rates for men and women, selected the companies who would participate, and entered contracts with these companies, the Court found it to be plainly responsible for the "discriminatory features"[200] of the plan re-

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[192] *Id.* at 3495.
[193] *Id.* at 3498 (quoting *Manhart*, 435 U.S. at 716-17).
[194] *Id.* at 3498-99.
[195] *Id.* at 3495.
[196] *Norris*, 486 F. Supp. 645, 651 (D. Ariz. 1980), *aff'd*, 671 F.2d 330 (9th Cir. 1982).
[197] *Norris*, 103 S. Ct. at 3498 (quoting *Manhart*, 435 U.S. at 709).
[198] *Id.* at 3498.
[199] *Id.* at 3499.
[200] *Id.* at 3501.

gardless of whether third parties were involved or not.[201] Arizona argued that it did not violate Title VII because the participating insurance companies merely reflected what was available on the open market.[202] The Court did not find this to be a viable defense. The open market exception established in *Manhart* only operates when the employer sets the money aside and permits employees to purchase annuities of his/her choice.

Justice Marshall lost the vote of Justice O'Connor on the issue of relief. Justice O'Connor joined Justice Powell's dissent as to Part III, which then became the Powell majority holding on this issue,[203] making the ruling completely prospective. Both the Marshall and Powell opinions were extremely concerned with costs and it was this issue which ultimately swayed Justice O'Connor away from any form of retroactive relief.

The Powell dissent looked very closely at costs as it would impact on the insurance/pension industry and consequently on the employee. Justice Powell felt the effect of the majority's holding reached too far into the insurance industry, something Congress did not intend when it enacted Title VII and when it enacted the McCarran-Ferguson Act.[204] The Court itself had been cautious in its approach to the insurance industry when it said in *Manhart*: "Title VII 'was not intended to revolutionize the insurance and pension industries.'"[205]

The Marshall majority addressed the effect on the insurance industry briefly by noting that no insurance company had been joined as a defendant, and further no insurance company is precluded from offering sex-based annuities on the open market.[206] Also, Justice Marshall noted, the petitioners, Arizona Governing Board, had made no mention of the interplay of Title VII and the McCarran-Ferguson Act either in their petition for certiorari or their brief. "Only in the most exceptional cases will we consider issues not raised in the petition."[207] The Second Circuit in *Spirt*[208] made a stronger argument. "[B]ased on the historical context, the legislative history, and judicial interpretations of that history, . . . Congress . . . had no intention of declaring that subsequently enacted civil rights legislation would be inapplicable to any and all activities of an insurance company."[209] Further, the Court in *Spirt*

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[201] *Id.*

[202] *Id.* at 3500.

[203] *Id.* at 3504-10 (Powell, J., dissenting with whom Burger, C.J., Blackmun and Rehnquist J.J., join in parts I and II; joined by O'Connor, J., as to part III).

[204] 15 U.S.C. §§ 1011-1015 (1976).

[205] 103 S. Ct. at 3506 (quoting *Manhart*, 435 U.S. at 717).

[206] *Id.* at 3500 n.17.

[207] *Id.* (quoting Stone v. Powell, 428 U.S. 465, 481 n.15 (1976)).

[208] 691 F.2d 1054, *cert. granted*, 103 S. Ct. at 3565 (1983).

[209] *Id.* at 1065.

found language surrounding the ERISA[210] hearings establishing that members of Congress believed Title VII did prohibit sex discrimination in pension plans.[211] Finally, that Court noted Title VII contains a clear, preemptive provision over state laws which would attempt to permit unlawful employment practices,[212] a provision to which the dissent in *Norris* did not refer.

In answering the question as to congressional intent when a Title VII remedy involves a major financial impact, the Marshall majority opinion in *Norris* and the majority opinion in *Newport News*,[213] decided one week before *Norris*, looked closely at the legislative history surrounding the passage of the Pregnancy Discrimination Act of 1978.[214] The Marshall majority in *Norris* found Congress to be well aware of the increased costs to employees of including pregnancy on the same terms as other disabilities, but passed the legislation "to clarify [the] originial intent" of Title VII.[215] Therefore, Justice Marshall found that Congress did not intend for cost to be a deterrent to Title VII enforcement. The social policy goal of preventing discrimination against individuals in the work place justifies the costs entailed in fulfilling the goal.

Although Justice O'Connor joined in repudiating gender-based actuarial tables to compute benefits, she was unable to join Justice Marshall in awarding the plaintiff class any retroactive relief. Justice Marshall in his minority opinion argued that the *Norris* decision was "clearly foreshadowed by *Manhart*;"[216] therefore, Arizona and all other employers had notice as of that decision. Any disparity in benefits from contributions made after *Manhart* cannot qualify as a special circumstance negating the *Albemarle* presumption in favor of retroactive relief.[217] Therefore, benefits calculated from 1978 on, should be figured on a unisex basis. The district court in *Norris* ordered all benefits as of the date of its decision to be equal for similarly situated men and women.[218] However, as both Justice Marshall and Justice Powell noted, this would in effect be retroactive, because the monthly benefits would be based on prior contributions which had not been calculated on the basis of equal pay-outs.[219] The Marshall minority opinion wanted the case remanded to

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[210] Employment Retirement Income Security Act of 1974, 29 U.S.C. 1001-1381 (Supp. II 1978).
[211] *Spirt*, 691 F.2d at 1065.
[212] *Id.*
[213] 103 S. Ct. at 2622.
[214] 42 U.S.C. § 2000e(k) (Supp. IV 1980).
[215] *Norris*, 103 S. Ct. at 3499 n.14.
[216] *Id.* at 3503.
[217] *Id.*
[218] *Norris*, 486 F. Supp. at 645.
[219] *Norris*, 103 S. Ct. at 3509-10.

the district court to determine whether sex-neutral tables could be applied to pre-*Manhart* contributions without violating an individual's contractual rights as to an expected monthly retirement payment.[220] Though not mentioned by Justice Marshall, another determination to be made would be whether a change in a male's expected benefit might be in violation of the requirement of the Equal Pay Act that compliance not act "to reduce the wage rate of an employee."[221]

Justice O'Connor, a native of Arizona, and majority leader of the Arizona Senate in 1972 which had approved the law which created the Arizona Governing Board,[222] supported prospective application of the *Norris* holding because of her concern for "bankrupting pension funds."[223] Justice O'Connor examined her nonretroactivity ruling in light of the three criteria established in *Chevron Oil Co. v. Huson*[224] and found the third criterion controlling: retroactivity would impose inequitable results.[225] Justice O'Connor required that only those benefits derived from contributions made after the date of the Court's ruling be determined without regard to sex. As to contributions collected previously, employers and insurers were able to calculate benefits as they had in the past.[226] It was this relief that the Court in *Norris* finally ordered.

Justice Powell also concerned with potentially devastating pension funds noted in his dissent that "the holding [today] applies to all employer-sponsored pension plans;"[227] therefore retroactive application could range from 817 million dollars to 1,260 million dollars for the next thirty years according to a Department of Labor Cost Study.[228] The impact on Arizona, had the *Norris* decision been made at least partially retroactive, is not known since Arizona would have been required to either top-up benefits[229] or to recompute benefits using unisex tables. It can be assumed that retroactivity would have imposed a substantial financial burden on Arizona as well as many other

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[220] *Id.* at 3504.

[221] 29 U.S.C. § 206(d)(i) (1976).

[222] *See* Witt, *supra* note 19, at 571.

[223] *Norris*, 103 S. Ct. at 3512 (O'Connor, J., concurring in part).

[224] 404 U.S. 97 (1971). The three criteria are: (1) did the decision establish a new principle of law; (2) would retroactivity further or retard the result; and (3) would retroactivity impose inequitable results. *Id.* at 106-07.

[225] 103 S. Ct. at 3512.

[226] *Id.*

[227] *Id.* at 3510.

[228] *Id.* (The Court referred to U.S. DEPT. OF LABOR, COST STUDY OF THE IMPACT OF AN EQUAL BENEFITS RULE ON PENSION BENEFITS 4 (1983)).

[229] Topping-up is increasing a female's benefits to the level of a male's benefits determined through the use of sex-based actuarial tables. Unisex tables would result in a decrease for the male and an increase, somewhat smaller than a topped-up increment, for the female. Key, *supra* note 162, at 35-36.

employers. It should be noted, however, that the entire pension industry's assets have been valued at 560 billion dollars.[230] Given Justice Powell's figures for retroactive relief, this represents only .15 percent to .23 percent of the current industry assets. If the holders of the assets could be held liable as they were in *Spirt*,[231] the financial impact argument against retroactivity would be largely dissipated.

As a matter of good strong social policy the Marshall majority opinion in *Norris* expanded the rule of *Manhart* into a workable generalization. Treatment of an individual in a manner, which but for that person's sex would be different, will be found to be gender-discrimination under Title VII regardless of the underlying rationale for the treatment. Title VII analysis is a distinct statutory approach to discrimination in the workplace. The statute's focus is clearly on the individual. Generalizations about race, sex, etc. cannot be countenanced if they wreak a negative effect on an individual. Justice Marshall, in his majority opinion relied strongly on *Manhart* to create good law. However, just as Justice Marshall favored retroactive relief in *Manhart* based on the sound legal principle developed in *Albemarle*, his continued reliance on the principle of making the injured party whole, found him without support in *Norris*. Justice O'Connor, who had reason to be knowledgeable about the impact of retroactive relief on the State of Arizona joined Justice Powell's economically-based ruling, making the *Norris* holding prospective only. In balancing legal principle against economic reality, economics controlled, creating the smallest impact possible in a decision of major importance.

V. CONCLUSION

As one commentator noted, "[f]or reasons of social policy . . . certain classifications that may be perfectly sensible and useful from an actuarial standpoint, may be barred.[232] The decision in *Norris* came down on the side of social policy. Persons may not be treated differently on the basis of sex. The Court has discarded its cloudy Title VII/equal protection reasoning for a clear reading of the statute with its focus on individual protection. The decision had a substantial impact on the insurance industry regardless of the prospectivity of the holding. As of August 1, 1983, gender-based actuarial tables cannot be used to compute retirement benefits for employees. However, gender-based actuarial tables can still be used in the "open-market" since Title VII only regulates conditions in the work place. In addition, sex can still be considered when a company determines the price of a pension program. Currently pending is the Economic Equity Act which bans sex discrimination in

[230] Sarajohn, *Women's Organizations Hit Insurance Industry Practices*, 1983 CONG. Q. WEEKLY 788.

[231] *See supra* notes 208-12 and accompanying text.

[232] Key, *supra* note 162, at 44.

the insurance industry. Interestingly enough, both sides in the unisex insurance debate have cited *Norris* as a qualified victory. Judy Goldsmith, President of the National Organization of Women predicted the decision will eventually result in the elimination of sex as a factor in all forms of insurance.[233] Richard S. Schweiker, president of the American Council of Life Insurance was "pleased" that the ruling was not made retroactive.[234]

Congress has a clear mandate from the rulings in *Manhart* and *Norris* that just as race discrimination based on racial generalizations will not be tolerated in the workplace under Title VII neither will sex discrimination. It remains to be seen whether Congress will expand this mandate to encompass economic equity in the insurance industry itself. It is safe to say Congress will not move to legislatively overrule *Norris*. Moreover, as of August 1, 1983, as announced in *Norris*, employers who fall within the scope of Title VII are on notice that contributions towards monthly retirement annuities must be sufficient to pay future male and female retirees equal monthly benefits.

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[233] Witt, *supra* note 19, at 1406.
[234] *Id.*